

TEMPORARY USER AGREEMENT

Dated as of August 15, 1973

7147
RECORDATION NO. _____ Filed & Recorded
SEP 4 1973 - 2 45 PM
FEDERAL COMMERCE COMMISSION

between

THRALL CAR MANUFACTURING COMPANY

and

NORFOLK AND WESTERN RAILWAY COMPANY

TEMPORARY USER AGREEMENT, dated as of August 15, 1973, between THRALL CAR MANUFACTURING COMPANY, an Illinois corporation (the "Vendor"), and NORFOLK AND WESTERN RAILWAY COMPANY, a Virginia corporation (the "Railroad").

RECITALS

The Vendor has agreed to construct, sell and deliver to the Railroad, and the Railroad has agreed to purchase, the railroad equipment described in Schedule A hereto (the "Equipment").

In order that the Equipment may be delivered to and put to use by the Railroad pending consummation of permanent financing arrangements for acquisition of the Equipment, the Vendor has agreed that the Railroad may acquire possession of and the right to use the Equipment in accordance with and subject to the terms of this Agreement.

* * * * *

NOW, THEREFORE, in consideration of the mutual promises, covenants and agreements hereinafter set forth, the Vendor and the Railroad hereby agree as follows:

1. The Vendor will deliver the Equipment to the Railroad f.o.b. at the point or points and in accordance with the delivery schedule set forth in Schedule A hereto. The Vendor's obligation as to time of delivery is subject, however, to delays resulting from causes beyond the Vendor's reasonable control. Upon delivery of each unit of the Equipment to the Railroad, an authorized representative of the Railroad will execute and deliver to the Vendor a certificate of acceptance certifying, if such be the case, that such unit has been built in accordance with the specifications therefor and acknowledging receipt of delivery thereof under this Agreement, whereupon the Railroad shall assume the responsibility and risk of loss with respect to such unit so accepted.

2. The rights of the Railroad hereunder in respect of each unit of the Equipment shall commence on the date of acceptance of such unit hereunder and end on December 31, 1973, or earlier as hereinafter provided. Title to the Equipment shall remain in the Vendor, and the Railroad's right and interest therein is and shall be solely that of possession, custody and use under this Agreement. The Railroad or any third party acquiring an interest in the Equipment by reason of

the conditional sale, equipment trust or other financing of the purchase price of the Equipment by the Railroad shall not by virtue of this Agreement or the possession and use of the Equipment by the Railroad under or pursuant to this Agreement or of anything permitted to be done by the Railroad hereunder in respect of the Equipment, acquire any title to or ownership of the Equipment, or any unit thereof, and the title to or ownership of the Equipment shall remain solely in the Vendor. Transfer of title to the Equipment to the Railroad or to a trustee under an equipment trust agreement shall be effected only at the time of delivery by the Vendor of a bill of sale of the Equipment either hereunder or under permanent financing arrangements. The terms of this Agreement shall automatically be superseded and canceled without further action by or notice to any party concerned as to each unit of the Equipment by the terms of a conditional sale agreement or other equipment financing agreement at the earlier to occur of the time of the payment to the Vendor of the purchase price of such unit or the time of filing with the Interstate Commerce Commission of said conditional sale or other equipment financing agreement covering such unit, except the terms of paragraphs 4, 7, 9 and 11 hereof to the extent not covered, as respects Thrall Car Manufacturing

Company or any assignee of its rights hereunder, by permanent financing arrangements and except for the obligation of Railroad to pay the purchase price under subparagraph 3(a) hereof and any interest which may accrue under subparagraph 3(b) hereof.

This "Temporary User Agreement" is a financial arrangement, under which Railroad will have custody, possession and use of the Equipment purchased from Vendor, and the risk of loss of the Equipment is on the Railroad. The Railroad shall acquire beneficial ownership of the Equipment under this Agreement and under the permanent financing arrangements referred to above at the time of delivery of the Equipment and at that time is entitled, as between Railroad and Vendor, to the investment tax credit under Section 48 and depreciation under Section 167, or amortization under Section 184 of the Internal Revenue Code of 1954, and the Vendor is not entitled to such investment tax credit, depreciation or amortization.

3. (a) The initial unit price and initial total price of the Equipment are set forth in Schedule A hereto. At any time before the assignment by the Vendor of its rights under this Agreement and the payment therefor by an assignee of the Vendor's rights hereunder in respect of any unit of the Equipment such initial prices shall be subject to such increase or decrease as may be agreed to by the Vendor and the Railroad, and the term

"purchase price" as used herein shall mean such initial prices as so increased or decreased. The Railroad hereby acknowledges itself to be indebted to the Vendor, and hereby promises to pay or cause to be paid to the Vendor, on or before December 31, 1973, in cash the purchase price of each unit of the Equipment delivered to and accepted by the Railroad hereunder.

(b) In addition to the payment of the purchase price under the foregoing subparagraph 3(a), the Railroad agrees to pay to the Vendor interest on the unpaid purchase price of each such unit at the rate specified in Schedule B hereto. Except as provided in paragraph 8 hereof, such interest shall begin to accrue with respect to each such unit ten calendar days after the date of receipt by the Railroad of a proper invoice for such unit, accompanied by a duly executed certificate of acceptance of each such unit in substantially the same form as set forth in Schedule C hereto, and shall cease one day prior to the date of the payment to the Vendor of the purchase price of such unit under either this Agreement or the aforesaid conditional sale or other equipment financing agreement. The Vendor agrees that it will not submit to the Railroad for payment such invoices accompanied by certificates of acceptance for groups of less than 25 units of the Equipment. Such interest in respect of each unit of the Equipment shall be due and payable to the

Vendor by voucher mailed by the Railroad from Roanoke, Virginia, on the date of payment of the purchase price of such unit.

4. The Railroad agrees that it will permit no lien of any kind to attach to the Equipment and that it will pay promptly all taxes and assessments which may accrue or be imposed upon or in respect of the Equipment by reason of or in connection with the Railroad's possession, use or operation thereof under this Agreement. The Railroad's obligations contained in this paragraph 4 shall survive the termination of this Agreement.

5. The Railroad shall, at its own expense, keep and maintain the Equipment in good order and repair at all times. The Railroad shall pay to the Vendor the purchase price of each unit of the Equipment lost, destroyed or irreparably damaged during the term of this Agreement.

6. Prior to delivery of each unit of the Equipment to the Railroad, it will be numbered with the appropriate road number set forth in Schedule A hereto. In contemplation of subsequent delivery of the Equipment under permanent financing arrangements, the Railroad will, throughout the term of this Agreement, keep and maintain plainly, distinctly, permanently and conspicuously marked in stencil on each side

of each unit of the Equipment, in letters not less than one inch in height, the following legend:

OWNED BY A BANK OR TRUST COMPANY UNDER A SECURITY
AGREEMENT FILED UNDER INTERSTATE COMMERCE ACT, SECTION 20c.

The Railroad may also cause the Equipment to be lettered "Norfolk and Western," "N&W," "NW," or in some other appropriate manner for convenience of identification of the interest of the Railroad therein.

7. The Railroad shall indemnify, protect and hold harmless the Vendor from and against all losses, damages, injuries, liabilities, claims and demands whatsoever, regardless of the cause thereof, and expenses in connection therewith, including counsel fees, arising out of retention by the Vendor of title to the Equipment or out of the possession, use and operation thereof by the Railroad during the period when title thereto remains in the Vendor. This covenant of indemnity shall continue in full force and effect notwithstanding the full payment of the indebtedness in respect of the purchase price of the Equipment, as provided in paragraph 3 hereof, and the conveyance of the Equipment, as provided in paragraph 2 hereof, or the termination of this Agreement in any manner whatsoever.

8. All or any of the rights, benefits or advantages of the Vendor, including the right to receive the purchase price of any unit of the Equipment or any other payments under this Agreement, may be assigned by the Vendor and reassigned by any assignee at any time or from time to time; provided, however, that no such assignment shall subject any such assignee to any of the Vendor's obligations contained in this Agreement relating to the Equipment. In the event the Vendor assigns its right to receive the payments to be made by the Railroad under this Agreement and the Railroad receives written notice thereof from the Vendor, together with a counterpart of such assignment stating the identity and the post office address of the assignee, all payments thereafter to be made by the Railroad under this Agreement shall, to the extent so assigned, be made to the assignee against receipt therefor. Notwithstanding any provision herein to the contrary, in the event the Vendor assigns its right to receive the payments to be made by the Railroad under this Agreement, (i) interest payable by the Railroad pursuant to subparagraph 3(b) hereof in respect of each unit of Equipment shall begin to accrue on the date that the Vendor receives payment from such assignee in respect of each such unit after the delivery thereof and not on the

date set forth in subparagraph 3(b) hereof and (ii) all payments hereunder to such assignee shall be made in immediately available funds.

9. In the event of any assignment by the Vendor of its right to receive any payments under this Agreement, the rights of such assignee to such payments as may be assigned, together with any other rights hereunder which can be and are so assigned, shall not be subject to any abatement, defense, setoff, counterclaim or recoupment whatsoever arising by reason of any obligations, indebtedness or liability at any time now or hereafter owing to the Railroad by Thrall Car Manufacturing Company or any assignee of Thrall Car Manufacturing Company. Any and all such obligations, indebtedness or liability, howsoever arising, shall be or remain enforceable by the Railroad against Thrall Car Manufacturing Company or any assignee of Thrall Car Manufacturing Company only.

10. The Vendor agrees that, upon receipt of all payments provided to be made to it under this Agreement by the Railroad and/or by the trustee under an equipment trust which has been created to provide for the financing of the Equipment, it shall thereupon execute and deliver to or upon the order of the Railroad a bill of sale of the Equipment in customary form with full warranty of title, free and clear of all liens and encumbrances.

11. The Railroad will cause this Agreement, any assignment hereof, and any amendments or supplements hereto or thereto to be filed and recorded with the Interstate Commerce Commission and otherwise as may be required by law or reasonably requested by the Vendor for the purpose of protection of its title to the Equipment and its rights under this Agreement or for the purpose of carrying out the intention of this Agreement. If the Equipment is to be used upon lines of railroad in any jurisdiction outside the United States of America, the Railroad shall prior to such use, to the satisfaction of the Vendor, arrange for the filing, recording or deposit (or any similar action) of all instruments required or advisable to protect the security interest of the Vendor in the Equipment in that jurisdiction.

12. The term "Vendor" whenever used in this Agreement means, before any assignment of any of its rights hereunder, Thrall Car Manufacturing Company and any successor or successors for the time being to its manufacturing business and after any assignment any assignee for the time being of such particular assigned rights as regards such rights and any assignor or assignors as regards any rights hereunder that are retained or excluded from any assignment.


13. The terms of this Agreement and all rights and obligations hereunder shall be governed by the laws of the Commonwealth of Virginia; provided, however, that the parties shall be entitled to all rights conferred by Section 20c of the Interstate Commerce Act and by the recordation provisions of any other Act pursuant to which this Agreement is recorded.

14. This Agreement, which is dated for convenience as of August 15, 1973, may be executed in any number of counterparts, each of which shall be deemed to be an original, and such counterparts together shall constitute a single instrument.

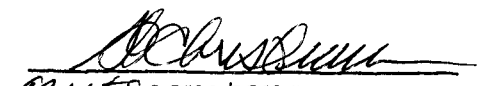
IN WITNESS WHEREOF, the Vendor and the Railroad have caused this instrument to be signed and acknowledged by their proper officials and their respective corporate seals to be hereunto affixed and duly attested, as of the day and year first above written.

THRALL CAR MANUFACTURING COMPANY

By


Vice President

ATTEST:


Secretary

NORFOLK AND WESTERN RAILWAY COMPANY

By *C. B. Deibel*
Assistant Vice President-Finance

ATTEST:

J. A. Collyer
Assistant Secretary

STATE OF ILLINOIS)
COUNTY OF *Cook*) ss.:

On this *31st* day of *August*, 1973, before me personally appeared *John P. Lynch*, to me personally known, who, being by me duly sworn, says that he is *Vice President* of Thrall Car Manufacturing Company, that one of the seals affixed to the foregoing instrument is the corporate seal of said corporation, that said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors, and he acknowledged that the execution of the foregoing instrument by him on this date was the free act and deed of said corporation.

Denna L. Krey
Notary Public

MY COMMISSION EXPIRES
JAN 17 7 1977

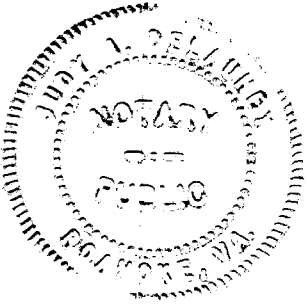
COMMONWEALTH OF VIRGINIA)
CITY OF ROANOKE) ss:

On this *30th* day of *August*, 1973, before me personally appeared C. B. Deibel, to me personally known, who, being by me duly sworn, says that he is Assistant Vice President - Finance of Norfolk and Western Railway Company, that one of the seals affixed to the foregoing instrument is the corporate seal of said corporation, that said instru-

ment was signed and sealed on behalf of said corporation by authority of its Board of Directors, and he acknowledged that the execution of the foregoing instrument by him on this date was the free act and deed of said corporation.

Judy A. McLaury
Notary Public

My Commission Expires April 5, 1977



SCHEDULE A
to
TEMPORARY USER AGREEMENT
Dated as of August 15, 1973
between
THRALL CAR MANUFACTURING COMPANY
and
NORFOLK AND WESTERN RAILWAY COMPANY

Type of Equipment

Specifications

100-ton 86' boxcars

Railroad's Specification dated April 27, 1973, revised as of July 23, 1973, as may hereafter be amended from time to time by mutual agreement

| <u>AAR Symbol</u> | <u>Plant</u> | <u>Quantity</u> | <u>Railroad's Road Numbers (both inclusive)</u> |
|-----------------------|------------------------------|-----------------|---|
| XL | Chicago Heights, Illinois | 106 | 861164 - 861269 |

| <u>Initial Estimated Unit Price</u> | <u>Initial Estimated Total Price</u> | <u>Delivery</u> |
|---|--|---|
| \$34,850 | \$3,694,100 | At Chicago, Illinois, in September and October, 1973 |

SCHEDULE B

The rate of interest which shall be paid pursuant to subparagraph 3(b) of the attached Temporary User Agreement on the unpaid balance of the purchase price (as defined in subparagraph 3(a) of the attached Temporary User Agreement) shall be one and one-half percent above the Prime Rate (namely the rate charged by Continental Illinois National Bank & Trust Company of Chicago for 90-day unsecured commercial loans at Chicago, Illinois, to large corporate customers of the highest credit rating) from time to time in effect (and changing simultaneously with each change in the Prime Rate) during the period that interest accrues pursuant to the attached Temporary User Agreement.

CERTIFICATE OF ACCEPTANCE

The undersigned, a duly authorized representative of Norfolk and Western Railway Company (the "Railroad"), hereby certifies that the following described units of railroad equipment (the "Equipment"):

Description:

Manufacturer
or Vendors:

Quantity:

Road Numbers:

Delivered at:

have been completed in accordance with the requirements and provisions of

have been delivered to the Railroad and have been inspected and accepted on behalf of the Railroad as of the date indicated below.

The undersigned further certifies that there was plainly, distinctly, permanently and conspicuously marked in stencil on both sides of each unit of the Equipment at the time of its acceptance the following legend, in letters not less than one inch in height:

OWNED BY A BANK OR TRUST COMPANY UNDER A SECURITY
AGREEMENT FILED UNDER INTERSTATE COMMERCE ACT, SECTION 20c.

Authorized Representative of
Norfolk and Western Railway Company

Dated: